Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-262-94
GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA
9 DECEMBER 1995

***Contract** — Breach — Fundamental breach — Sale and purchase of land — Balance of purchase price not paid on the ground that respondent failed to deliver executed memorandum of transfer — Whether payment of purchase price in sale of land was a fundamental term — Whether delivery of executed memorandum of transfer was a fundamental term — Whether party who terminates a contract upon breach of non-fundamental term is himself guilty of breach — Remedies for breach of fundamental term and subsidiary term*

In October 1991, the respondent — an owner of a certain piece of property ('the property') — entered into an agreement with the appellant for the sale and purchase of the property at a purchase price of RM4,990,000 ('the first agreement'). Clause 5 of the first agreement required the respondent to deliver up duly executed memorandum of transfer to the appellant's solicitors to be held by them pending the conclusion of the sale. The appellant paid the respondent a sum of RM250,000 as a deposit and entered a private caveat against the property. In December 1991, the parties entered into a second agreement which stipulated for an increase in the purchase price of RM3m. In October 1992, the appellant sent a cheque in the sum of RM4,740,000 in purported payment of the balance of the purchase price. However, the cheque was dishonoured because the payment on the cheque was stopped by the appellant on the ground that the respondent had failed to comply with cl 5 of the first agreement. In July 1993, the appellant commenced proceedings against the respondent for specific performance. The respondent applied to strike out the action under O 18 r 19 of the Rules of the High Court 1980. The judicial commissioner granted the respondent's application and ordered the appellant's action to be struck out. The appellant appealed. Counsel for the appellant submitted that the judicial commissioner had erred in holding that the appellant was without a cause of action. He argued that the respondent had breached its obligation to deliver the memorandum of transfer in accordance with the provisions of cl 5 of the first agreement and that the appellant was therefore entitled to withhold the payment of the balance of the purchase price.

Held, dismissing the appeal:

(1) In every contract, be it for the sale of land or any other commodity, there are some terms that are of fundamental importance and others of less or minor importance. Where the term that has been flouted is fundamental to the contract, the innocent party is

entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term (see p 681G–H).

(2) A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract (see p 681I).

(3) Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends on the way in which the particular contract is constructed. Nevertheless, in the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. So too is a term that the vendor has good title to the property that is the subject matter of the sale. If the parties desire to make some other obligation fundamental in nature, they must make it dependent upon one or other of these terms (see p 682A–B); *Bettini v Gye* (1875–76) 1 QBD 183 and *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 followed.

(4) Another approach is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages, but not to treat the contract as being at an end (see pp 682I and 683A); *Bowes v Chaleyer* (1923) 32 CLR 159 and *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26 followed.

(5) Applying either of the tests to the facts of the present appeal — having regard to the terms of the first agreement as a whole — it was clear that the stipulation as to the payment of the purchase price was a fundamental term. It was also clear that the obligation to deliver the executed memorandum of transfer was merely a subsidiary term, the non-performance of which did not relieve the appellant from his obligations under the contract. Therefore, the appellant's failure to pay the purchase price was fatal to its case (see p 684B–C).

[Bahasa Malaysia summary

Pada bulan Oktober 1991, penentang — yang merupakan pemunya sebidang tanah ('tanah tersebut') — mengikat suatu perjanjian dengan perayu untuk jual beli tanah tersebut pada harga belian RM4,999,000 ('perjanjian pertama'). Fasal 5 perjanjian pertama menghendaki penentang untuk menghantar-serah memorandum pindahmilik yang telah disempurnakan kepada peguamcara perayu untuk dipegang oleh mereka sementara menunggu penyempurnaan jualan. Perayu

membayar kepada penentang sebanyak RM250,000 sebagai deposit dan memasukkan kaveat persendirian terhadap tanah tersebut. Pada bulan Disember 1991, pihak-pihak mengikat perjanjian kedua yang menetapkan kenaikan harga belian sebanyak RM3 juta. Pada bulan Oktober 1992, perayu menghantar cek bernilai RM4,740,000 yang bermaksud untuk membayar baki harga belian tersebut. Bagaimanapun, cek itu tidak dapat ditunaikan kerana bayaran ke atas cek tersebut telah dihentikan oleh perayu atas alasan bahawa penentang telah gagal untuk mematuhi fasal 5 perjanjian pertama. Pada bulan Julai 1993, perayu memulakan prosiding terhadap penentang untuk pelaksanaan spesifik. Penentang memohon untuk membatalkan tindakan itu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Pesuruhjaya kehakiman membenarkan permohonan penentang dan memerintahkan supaya tindakan perayu dibatalkan. Perayu membuat rayuan. Peguam perayu menghujahkan bahawa pesuruhjaya kehakiman membuat kesilapan dalam memutuskan bahawa perayu tidak mempunyai kausa tindakan. Beliau menghujahkan bahawa penentang telah melanggar obligasinya untuk menghantar-serah memorandum pindahmilik mengikut peruntukan-peruntukan fasal 5 perjanjian pertama dan bahawa perayu dengan itu berhak untuk menahan bayaran baki harga belian.

Diputuskan, menolak rayuan:

(1) Dalam setiap kontrak, sama ada jualan tanah atau apa-apa komoditi lain, terdapat beberapa terma yang penting dan yang lain-lainnya kurang penting. Di mana terma yang telah dilanggar adalah penting kepada kontrak, pihak yang tidak bersalah berhak untuk menganggap dirinya sebagai dilepaskan daripada obligasi selanjutnya di bawah kontrak itu. Tetapi di mana obligasi yang dilanggar hanyalah bersifat subsidiari, pihak yang tidak bersalah tidak boleh menganggap dirinya sebagai bebas daripada obligasinya di bawah kontrak itu, walaupun beliau boleh menyaman dan mendapat ganti rugi akibat ketaklaksanaan terma subsidiari (lihat ms 681G–H).

(2) Pihak yang menamatkan suatu kontrak atau menganggapnya sebagai berakhir dengan berasaskan kepada pelanggaran terma yang tidak utama adalah bersalah melanggar kontrak (lihat ms 681I).

(3) Sama ada terma tertentu adalah penting kepada kontrak atau kepentingannya hanya subsidiari bergantung kepada cara dalam mana kontrak tertentu ditafsirkan. Walau bagaimanapun, jika tidak ada apa-apa pertimbangan-pertimbangan khas dalam kontrak untuk jualan tanah, obligasi untuk membayar harga belian adalah terma utama. Begitu juga terma bahawa penjual mempunyai hakmilik ke atas harta yang menjadi perkara subjek jualan. Jika pihak-pihak berhasrat untuk menjadikan beberapa obligasi lain bersifat utama, mereka mesti menjadikannya bergantung kepada satu atau lain-lain terma-terma itu (lihat

ms 682A–B); *Bettini v Gye* (1875–76) 1 QBD 183 dan *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 diikut. A

(4) Satu lagi pendekatan ialah dengan melihat kepada akibat-akibat pelanggaran terma berkenaan. Jika pelanggaran itu adalah bersifat bahawa ia menjejaskan asas kontrak, terma yang dilanggar adalah bersifat utama. Sebaliknya, jika akibat-akibat pelanggaran adalah B tidak serius dalam erti kata bahawa ia tidak menjejaskan asas kontrak, terma yang dipersoalkan adalah bersifat subsidiari dan pihak yang tidak bersalah berhak untuk mendapat ganti rugi, tetapi tidak untuk menganggap kontrak sebagai ditamatkan (lihat ms 682I dan 683A); *Bowes v Chaleyer* (1923) 32 CLR 159 dan C *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26 diikut.

(5) Menggunakan mana-mana satu ujian-ujian itu terhadap fakta-fakta rayuan ini — dengan mengambil kira terma-terma perjanjian pertama secara keseluruhannya — adalah jelas bahawa penetapan D berkenaan dengan bayaran harga belian adalah terma utama. Adalah juga jelas bahawa obligasi untuk menghantar-serah memorandum pindahmilik yang telah disempurnakan hanyalah terma subsidiari, dan ketaklaksanaannya tidak membebaskan perayu daripada obligasi-obligasinya di bawah kontrak itu. Oleh itu, kegagalan perayu untuk membayar harga belian adalah padah E kepada kesnya (lihat ms 684B–C).]

Notes

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 F Reissue) paras 2068–2075.

Cases referred to

Bettini v Gye (1875–76) 1 QBD 183
Bowes v Chaleyer (1923) 32 CLR 159
Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2 QB G 26
Wallis, Son & Wells v Pratt & Haynes [1910] 2 KB 1003

Legislation referred to

Rules of the High Court 1980 O 18 r 19 H

Appeal from: Civil Suit No S1–22–455–93 (High Court, Kuala Lumpur)

T Gunaseelan (*Saranjit Singh* with him) (*A Zahari Kanapathy Thulasi*) I for the appellant.

JH Low (*Mohd Izzam Zailani* with him) (*Ching Tan & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal against the order of the High Court at Kuala Lumpur striking out the appellant's action under the provisions of O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). We heard and dismissed this appeal on 19 October 1995 without calling upon the respondent to address us. The reasons for our decision are now produced.

The facts of this case may be briefly stated as follows. The parties to this appeal entered into an agreement dated 13 October 1991 ('the first agreement'), for the sale and purchase of a certain piece of property. The respondent, as owner of the property, was the vendor and the appellant was the purchaser. The agreement recites the purchase price to be RM4,990,000. Clause 5 of the agreement requires the respondent to deliver up duly executed memorandum of transfer to the appellant's solicitors to be held by them pending the conclusion of the sale. Such a provision is commonplace in the context of our conveyancing practice. It is merely to ensure that there is no undue delay in having the transfer adjudicated by the collector of stamp duty to ascertain the amount of duty payable, so that the instrument may be properly stamped and in readiness for presentation to the registering authority when the time for completion arrives.

To return to the narrative, the parties — on 12 December 1991— entered into a second agreement ('the second agreement') which stipulated for an increase in the purchase price of RM3m. In consequence of the second agreement, the appellant was obliged to pay a total purchase price of RM7,990,000. However, the appellant contended that although the second agreement was voluntarily entered into and executed, the additional sum of RM3m was never meant to be paid. The appellant had, on 7 June 1991, that is to say, even before the first agreement had been executed, paid the respondent a sum of RM250,000 as a deposit for the purchase of the property in question. The appellant also entered a private caveat pending the completion of the sale to it.

Now, according to the respondent, the balance of the purchase price was due and payable not later than 30 July 1991. The first agreement provides in cl 2 that the balance is to be paid by the appellant within four months 'from the date of the notification of the development order for the said project'. Whether this was ever a live issue in the proceedings in the court below is a matter we shall touch upon later in the judgment.

There is no dispute that the appellant sent a cheque in the sum of RM4,740,000 on 9 October 1992, in purported payment of the balance of the purchase price. Although the payment was, on the respondent's own evidence, made out of time, it was nevertheless accepted. But the cheque sent by the appellant was dishonoured. It was suggested before us by counsel that payment on the cheque was stopped because the respondent had failed to comply with cl 5 of the first agreement. If that was indeed the case, the easiest thing for the appellant to have done was to have informed the respondent that the funds were ready and available and that they would be paid across upon receipt of the transfer. There was certainly no

necessity for the appellant to have gone through the elaborate process of sending the cheque and then stopping payment on it. So much for the probative value of the point taken. But we would *ex abundanti cautela* add that even if the appellant had acted in the way suggested a moment ago, it would not have amounted to a valid tender of payment in law, having regard to the terms of the agreement in question.

On 29 July 1993, the appellant commenced proceedings against the respondent for specific performance. The respondent, after delivering its defence on 2 July 1994, applied by way of a summons returnable in chambers to strike out the action. The respondent's application, which is dated the same date as its defence, was made generally under O 18 r 19 of the RHC. Affidavit evidence was filed in support of, and in opposition to, the respondent's summons. Counsel then put in written submissions. The learned judicial commissioner, on the strength of the material before him, granted the respondent's application and ordered the appellant's action to be struck out. He gave cogent reasons for making the order that he did. We think it is appropriate to quote from his judgment. This is what he said:

> It is to be noted that although the defendant had accepted the plaintiff's cheque for the sum of RM4,740,000 (as the balance of the purchase price of the principal agreement), it was dishonoured upon presentation and hence there was a default on the part of the plaintiff. There was also a failure on the part of the plaintiff to pay the sum of RM3m pursuant to the supplementary agreement. Consequently, without the said payment for the sum of RM3m (due on 30 July 1992), the duly executed memorandum of transfer was not forwarded by the defendant's solicitors to the plaintiff's solicitors for adjudication.
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> The defendant is willing to return the deposit sum of RM250,000 which was forfeited earlier so long as the plaintiff is willing to lift the private caveat lodged by the plaintiff. The plaintiff on the other hand, has obtained an extension of the caveat vide Originating Summons No S2–24–287–94. As a result of the caveat, the defendant is unable to effect or register any dealings with the said property.
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> From the affidavits and the exhibits filed herein, it seems clear to me that the plaintiff has not complied with the provisions of both the principal agreement and the supplementary agreement in respect of the payment of the RM4,740,000 and RM3m respectively as the said sums still remain unpaid. From the facts of this case, it is obvious to me that the plaintiff has violated an essential term of the principal agreement pertaining to the payment of the sum of RM4,740,000 and of the supplementary agreement pertaining to the payment of the sum RM3m. Section 23(b) of the Specific Relief Act 1950 (Act 137) provides that:
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> > 'specific performance of a contract cannot be enforced in favour of a person who ... violates any essential terms of the contract that on his part remains to be performed'.
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> In *Lim Kim Swee v Tan Meng San* [1960] MLJ 262, the plaintiff agreed to buy from the defendant a piece of land, the consideration of which was to be paid in two parts, viz:
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> (a) payment of some money to one BK Singh; and

(b) the satisfaction of a debt owed by the defendant to one Coelho, who at the time was a chargee of the land.

The plaintiff fulfilled the first part of his obligation but not the second part. The plaintiff commenced proceedings for specific performance, but the Court of Appeal held that the plaintiff had no cause of action against the defendant until he had performed his part of the contract.

On the strength of s 23(b) of the Specific Relief Act 1950 and on the authority of *Lim Kim Swee v Tan Meng San*, it is plain and obvious to me that the plaintiff has no cause of action and that the plaintiff's claim herein for specific performance and/or general damages is frivolous, vexatious and an abuse of the process of the court.

In the circumstances, I hold that there are merits in the defendant's application under O 18 r 19 to strike the plaintiff's writ and statement of claim. I therefore strike out the plaintiff's writ and statement of claim with costs.

Before us, counsel for the appellant criticized this judgment on two grounds. His first submission was to the effect that the learned judicial commissioner had erred in holding that the appellant was without a cause of action. He argued that the respondent had breached its obligation to deliver the instrument of transfer in accordance with the provisions of cl 5 of the first agreement and that the appellant was therefore entitled to withhold the payment of the balance of the purchase price. His second submission was that the learned judicial commissioner had overlooked the lack of any evidence to show that the development order had been obtained or that its existence had ever been communicated to the appellant. In these circumstances, he submitted, it was inappropriate for the court to have acted under its summary jurisdiction and struck out the claim. We shall deal with each of the appellant's complaints in turn.

We first take the point concerning the breach of cl 5. In dealing with the arguments on this point, it is necessary to hearken to first principles, for it is a failure to appreciate these, we apprehend, which is the cause of confusion in the mind of the appellant.

Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.

Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed. Nevertheless, we think it is quite safe to state the principle in this way. In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. So too is a term that the vendor has good title to the property that is the subject matter of the sale. If the parties desire to make some other obligation fundamental in nature, they must make it dependent upon one or other of these terms.

In support of the suggested approach, we find it necessary to quote from two cases. The first is *Bettini v Gye* (1875–76) 1 QBD 183 where, at p 188, Blackburn J, when applying the test formulated by Parke B in *Graves v Legg* (1854) 9 Ex 709 said:

> In the absence of such an express declaration, [that is, an express declaration in the contract of an intention to make the performance of a particular term a condition precedent or not a condition precedent] we think that *we are to look to the whole contract*, and applying the rule stated by Parke B, to be acknowledged, *see whether the particular stipulation goes to the root of the matter*, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for, or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent. (Emphasis added.)

The second is *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 where Fletcher Moulton LJ said at p 1012:

> A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. *There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.* On the other hand, *there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract.* Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. (Emphasis added.)

Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages

A but not to treat the contract as being at an end. Although this test is usually ascribed by textbook writers to the decision of the English Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26, it has a much older origin.

In *Bowes v Chaleyer* (1923) 32 CLR 159, Isaacs and Rich JJ when B dealing with a somewhat similar question, said:

> We find ourselves unable to treat this as a simple and ordinary contract of sale. Its effect must be ascertained judicially. The actual incidents of the transaction are before us, and must be taken into account in estimating the importance of the particular provision in dispute, and *especially in estimating the potential effect on the contract as a whole of such a breach as that alleged.* But C we do not mean to say that the general principles of law applicable here differ in the least from those which would be applicable if the case were one of ordinary sale. (Emphasis added.)

In *Hongkong Fir Shipping*, the same test was propounded by Upjohn LJ in the following way (at p 64): D

> In my judgment, the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so-called, *depend entirely upon the nature of the breach and its foreseeable consequences.* Breaches of stipulation fall, naturally, into two classes. First, there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform E his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he ever so hard to remedy it. In that case F the question to be answered is, *does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?* If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only. (Emphasis added.)

In the same case, Diplock LJ formulated the test in these words (at p 70): G

> There are, however, many contractual undertakings of a more complex character which cannot be categorized as being 'conditions' or 'warranties,' if the late ninteenth-century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at p 280 be given to those terms. Of such undertakings, all that can be H predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and *the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as* I *a 'condition' or a 'warranty'.* For instance, to take Bramwell B's example in *Jackson v Union Marine Insurance Co Ltd* LR 10 CP 125 at p 142 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged

that the contemplated voyage is frustrated, it does have this effect. (Emphasis added.)

Applying either of the tests — the classical or the modern — to the facts of the present appeal, it is not difficult to recognize that, having regard to the terms of the first agreement as a whole, the stipulation as to the payment of the purchase price is a fundamental term. Equally, it is plain that the obligation to deliver the executed instrument of transfer is merely a subsidiary term, the non-performance of which does not relieve the appellant from his obligations under the contract. The learned judicial commissioner, therefore, rightly gave effect to the principles that govern this case and held the appellant's failure to pay the purchase price to be fatal to its case.

There is no doubt, as was repeatedly pointed out to counsel in the course of his argument, that the result may well have been different if, in the first agreement, the obligation on the part of his client to pay the purchase price had been made conditional upon the delivery up by the respondent of the memorandum of transfer. But that is not the case here. As it stands, the failure to fulfil the obligation on the part of the respondent to deliver the memorandum of transfer in question does not put an end to the contract. In as much as the appellant so assumed, it was wrong and consequently guilty of acting in breach of the first agreement. And so it follows that the argument is entirely without merit.

We now take the second point made by counsel. To remind ourselves, it has to do with the alleged failure of the respondent to communicate to the appellant about the issuance of the development order.

Now, in the affidavit delivered on the respondent's behalf it was alleged that the additional RM3m under the second agreement was due and payable, in accordance with its terms, within 30 days from the date of certification by the respondent's solicitors that the development order had been issued. The affidavit, proceeding on this basis, goes on to say that the last date for performance expired on 30 July 1991. The affidavit delivered by the appellant does not contain an assertion that the respondent or its solicitors failed to inform it (the appellant) or its solicitors that the development order had been issued. Neither was this point raised in the course of argument. It therefore comes as no surprise that the judge did not consider it. He is not to be faulted for the omission and it is therefore not open for the appellant to make a suggestion to that effect. We referred to this matter earlier on in our judgment in the context of whether the point taken was a live issue. For the reasons we have given, it is quite obvious that it is not.

In conclusion, we are of the view that this case does not raise any point of principle, but merely has to do with the construction of the particular contract that was entered into by the parties by reference to the well established rules that govern actions for breach of contract. The learned judge was accordingly well within the summary jurisdiction conferred upon him by O 18 r 19 of the RHC when he struck out the appellant's writ. Further, we are entirely satisfied that he proceeded upon correct principles when he granted the respondent's application.

A For the reasons given, we came to the conclusion that the appeal was devoid of merit and accordingly dismissed it. The usual orders that are consequent upon a dismissal were also made. Additionally, we ordered that the offending caveat entered by the appellant vide Presentation No 12767/91 against the register document of title be removed forthwith.

B *Appeal dismissed. Caveat ordered to be removed.*

Reported by Jafisah Jaafar

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